

Cultural Resource Management

What the Federal Laws Require

Presented to the COE Spring Rise 2006 Plenary Group for consideration

- Cultural and Burial Site Working Group
- SRST and CRST Tribal Historic Preservation Offices in consultation with CRST Legal Dept.



What are Cultural Resources?

- Cultural resources include:
“historic properties, archaeological resources, sacred sites, religious sites, burial sites, properties of traditional religious and cultural importance, and native American cultural items (including human remains, associated funerary objects, unassociated funerary objects, sacred objects, and objects of cultural patrimony). A cultural resource site is the location of a cultural resource. – **Programmatic Agreement on NHPA Compliance for Missouri River Basin, pp. A2-2.**



What Lands do Cultural Resource laws apply to?

- Federally owned lands
- Tribal lands held in trust by the federal government (including allotted lands)
- Title VI transferred lands to South Dakota
- Other lands impacted by a “federal undertaking”

- **Programmatic Agreement, pp. 3, Section 3**

- National Historic Preservation Act Section 106



What lands, sites and objects are protected?

Federal Law	Citation	Definition
National Historic Preservation Act	16 U.S.C. §470f	“any district, site, building, structure or object that is included or eligible for inclusion in the National Register”
Archaeological Resources Protection Act	16 U.S.C. § 470bb	“Archaeological Resources” including: “material remains of past human life or activities which are of archaeological interest” over 100 yrs Old
National Environmental Policy Act	42 U.S.C. §4321 (4)	Places obligation on federal agencies/ sets federal policy to “preserve important historic, cultural, and natural aspects of our national heritage and maintain, wherever possible, and environment which supports diversity and variety of individual choice.”
American Indian Religious Freedom Act of 1978	42 U.S.C. §2000bb-1 – 2000cc-5 & Executive Order 13007	Places obligation on federal agencies not to prohibit access to sacred sites through land use regulations/ obligation not to adversely affect to physical integrity of sacred sites.
Native American Graves Protection and Repatriation Act of 1990	25 U.S.C. §3001(1) &(3)	Burial sites and cultural items, including associated and unassociated funerary objects, sacred objects (ceremonial objects needed for the practice of traditional N. Am. Religions), and cultural patrimony (objects with ongoing historical, traditional or cultural importance central to a Native American group/ culture).
Antiquities Act of 1906/ Abandoned Shipwreck Act	16 U.S.C. §431-433 43 USC §2101-2106	Protects paleontologic resources- ARPA permits required for excavation/ Grants the Protection of the National Historic Preservation Act to covered sites, which include shipwrecks abandoned within navigable waters.

What Do the Federal Laws Require of the COE/ What activities do federal laws apply to?

- All “federal undertakings” which includes federal agency projects and federally funded projects
 - The COE acknowledges that, “Main Stem System Operations and Management actions meet the definition of undertakings for the purposes of Section 106 of the NHPA (16 U.S.C. §470f) and therefore, the Corps is responsible for complying with Section 106 for these actions” – Programmatic Agreement pp. 1, NHPA Section 106; ER 1105-2-100 pp. C-34/35 (applying NEPA, NHPA requirements to continuing projects including projects for “flood control, navigation, stream bank erosion control and shore protection)
- NHPA requires COE to 1) Establish a program to preserve, protect, identify, evaluate, and nominate historic properties and 2) to give full consideration to the preservation of historic properties not under their jurisdiction or control but affected by federal agency undertakings” - Programmatic Agreement pp. 1, NHPA Section 110
- NHPA requires that COE avoid, minimize, or mitigate adverse effects to properties on the National Historic Register and properties eligible for NHR. – Programmatic Agreement, pp. 2, Army Regulation 200-4, Section 2-3

What Do the Federal Laws Require of the COE/ What activities do federal laws apply to? (Cont'd)

- NHPA requires consultation with Tribal Governments on a government-to-government basis when undertaking may have impact on properties having historic value to Indian Tribes. Army Regulation 200-4 Section 2-3(1)
 - Consultation with Tribal Governments that are a party to the Programmatic Agreement must be done in accordance with the Agreement. Consultation with non-Agreement Tribes must be done in accordance with NHPA Section 106 and federal regulations
- If human remains are discovered, under NAGPRA, federal undertaking must cease for at least 30 days & make “reasonable efforts” to protect the remains.
- **“Failure to take the effects of an undertaking on historic properties into account IAW NHPA Section 106 and 36 C.F.R. 800 can result in formal notification from the ACHP to the Secretary of the Army of foreclosure of the ACHP’s opportunity to comment on the undertaking pursuant to the NHPA. A notice of foreclosure can be used by litigants against the Army in a manner that can halt or delay critical missions.”** Army Regulation 200-4, Section 203(2)
- Impact assessment are very similar to and are included in National Environmental Policy Act and are included in all Environmental Assessments required. Army Regulation 200-4, Section 2-2

What is the Programmatic Agreement and What is Required for Consultation/ Notice?

- PA was entered into in March/April 2004 between: COE, SD, NE, MT, ND, Cheyenne River Sioux, Turtle Mountain Band of Chippewa, Assiniboine & Sioux Tribes of Fort Peck, Crow Creek Sioux, Flandreau Santee Sioux, Lower Brule Sioux, Northern Arapahoe, Northern Cheyenne, Omaha of Nebraska, Ponca of Nebraska, Sac and Fox of Missouri, Santee Sioux, Sisseton-Wahpeton Sioux, Three Affiliated Tribes, Winnebago of Nebraska, and Eastern Shoshone under the authority of the NHPA and COE/NHPA regulations
- Represents an effort to Provide a forum for compliance with NHPA/NEPA and promote protection of cultural resources and compliance with all federal laws in recognition of the COE acknowledgement that **“sacred and cultural resources, many of which are historic properties, are critically important to the Affected Tribes for the continuity and revitalization of cultural and spiritual life-ways, making avoidance of adverse effects to these resources and the preservation of remaining sacred and cultural places a matter of the highest priority regardless of their eligibility to the National Historic Register of places.”** – Programmatic Agreement pp. 2

What is the Programmatic Agreement and What is Required for Consultation/ Notice?

- For Main Stem System Operations and their indirect effects, the PA consultation mechanisms are required. PA – Section 8A, Section 18 (Including Draft AOP's)
- Pre-decisional notice to PA contact for each party
- Follow-up telephone contact with PA Rep. for each party
- Provide information needed to make an informed judgment
- Parties must be given at least 30 days to respond to COE communication
- Consultation Guidelines:
 - COE agrees to “listen carefully before any decisions are made so as to understand the needs and perspectives of affected Tribes...” and other parties
 - Agrees to work as equal partners with parties to consider and devise means to identify and preserve cultural resource sites and avoid effects to them.
 - When avoidance is not possible, COE shall work as equal partners to minimize effects to the greatest extent possible.
 - Coe will provide all pertinent documents and other information to parties to enable fully informed decisions
 - Affected Tribes and other parties shall be provided with opportunity to review, offer corrections, and add alternative views to the record.
 - **Consultation is required with each affected Tribe - not just those Tribes with a seat on the Plenary Group.**
 - **Tribes that are not party to the PA must also be consulted under the NHPA Section 106 Process.**

What is the Federal Trust Responsibility to Tribes and What does it Mean?

- The Federal Trust Responsibility is firmly embedded in United States law and is founded in the United States Constitution, treaties, case law, numerous federal laws, Executive Orders, and policies.
- “As sovereigns, tribal governments have an inherent interest in all proposed and ongoing activities that may have a potential to significantly benefit or impact tribal trust lands, resources, or other interests. This special relationship is defined by Federal trust responsibilities, treaty obligations, and the inherent sovereignty of tribal governments.” – Northwestern Division Native American Program Desk Guide pp. 1
- **“The Federal Indian trust responsibility is a legally enforceable fiduciary obligation, on the part of the United States, to protect tribal lands, assets, resources, and treaty rights, as well as a duty to carry out the mandates of Federal law with respect to American Indian and Alaskan Native tribes.** In several cases discussing the trust responsibility, the Supreme Court has used language suggesting that it entails legal duties, moral obligations, and the fulfillment of understandings and expectations that have arisen over the entire course of dealings with the United States and the Tribes.”-Northwestern Division Native American Program Desk Guide pp. 3

Comments/Questions

- Thank You

